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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 249

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sun Oil Company, prays that a writ of certiorari be issued to review the judgment entered April 25, 1962 by the United States Court of Appeals for the Fifth Circuit (Cause No. 19001) and the order of the Federal Power Commission ("Respondent") issued March 3, 1961, as amended by the order issued March 31, 1961. The judgment dismissed the petition to review the order issued March 3, 1961, as amended by the order issued March 31, 1961.

OPINION BELOW

The order of the Respondent (sometimes called "Commission") issued March 3, 1961 (R. 57-63, J.A. 5-8)[1] is reported in Volume 25, Federal Power Commission Reports, at pages 379-382. The order of Respondent issued March 31, 1961, amending the order issued March 3, 1961 (R. 80-83, J.A. 28-31), is reported in Volume 25, Federal Power Commission Reports, at pages 609-610. The opinion of the Court of Appeals filed April 25, 1962 is not yet reported, and is printed in Appendix A, pp. 1a-5a; R. 121-125.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1962 (Appendix A, p. 5a; R. 126). Rehearing was denied May 29, 1962 (Appendix A, p. 5a; R. 136). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and section 19(b) of the Natural Gas Act.

QUESTION PRESENTED

Is Respondent's order issued March 3, 1961, as amended by its order issued March 31, 1961, which declares inoperative and of no effect at law all flexible pricing provisions, except those specifically exempted therein, in contracts executed by independent producers on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of Respondent, reviewable under section 19(b) of the Natural Gas Act?

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[1] Record references are to the transcript of record prepared by the Clerk of the United States Court of Appeals for the Fifth Circuit. Pages 51 through 94 of such record consists of the joint appendix filed with the Court of Appeals and references thereto are also included when applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the fifth amendment to the Constitution of the United States and sections 4, 5, 7, 16 and 19 of the Natural Gas Act, as amended (15 U.S.C. §§ 717c, 717d, 717f, 717o and 717r), section 402(a) of the Communications Act of 1934, as amended (47 U.S.C. § 402(a)), sections 2 and 4 of The Judicial Review Act (5 U.S.C. §§ 1032, 1034), and section 10 of the Administrative Procedure Act (5 U.S.C. § 1009), pertinent provisions of which are printed in Appendix B, pp. 6a-17a.

STATEMENT OF THE CASE

The proceeding before the Respondent, designated Docket No. R-153, was initiated by a Notice of Proposed Rulemaking dated April 4, 1956 (R. 54-56, J.A. 2-4). Respondent, by such notice, proposed to amend § 154.93 of its General Rules and Regulations (18 C.F.R. § 154.93) to provide that certain types of contract pricing provisions set forth in contracts subject to the Commission's jurisdiction would not be accepted for filing as rate schedules pursuant to section 4 of the Natural Gas Act. Almost five years later, on March 3, 1961, the Respondent issued an order designated Order No. 232. Commissioner Kline dissented in part (R. 57-63, J.A. 5-11). In general, such order promulgated definitions for a "definite escalation clause" and for an "indefinite escalation clause," and declared that any of the latter type clauses tendered for filing on or after April 3, 1961 "* * * shall be inoperative and of no effect at law" (R. 58-60, J.A. 6-8).

The order issued March 3, 1961, by its own term was to become effective April 3, 1961. Such order did per-

mit the filing of views and comments on or before March 20, 1961 (R. 60, J.A. 8). Petitioner advised the Commission by letter filed March 20, 1961, that it would file an application for rehearing setting forth the reasons why Petitioner believed the order would exceed Respondent's authority under the Natural Gas Act, would be contrary to the public interest and the administration of the Natural Gas Act, would deprive petitioner of its property without due process of law, and should be set aside (R. 64-65, J.A. 12-13). This application for rehearing, pursuant to section 19(b) of the Natural Gas Act, was timely filed on March 31, 1961 (R. 65-78, J.A. 13-26). The Commission took no action on such application for a period of thirty days and under section 19(a) of the Natural Gas Act and section 1.34(e) of the Respondent's Rules of Practice and Procedure under the Natural Gas Act, such application would be deemed denied on April 30, 1961. By letter dated May 4, 1961, the Commission stated Order No. 232, as modified by Order No. 232A, hereinafter discussed, prescribed a general rule upon which an application for rehearing would not lie under section 19 of the Natural Gas Act. In addition, the order stated the "petition" had been considered as a comment in response to Order No. 232 (R. 93, J.A. 41).

By Order No. 232A issued March 31, 1961, the Respondent changed certain findings in Order No. 232, and changed the provisions proscribing most flexible pricing clauses by adding the following proviso to section 154.93 of the Commission's Regulations under the Natural Gas Act:

> " '*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commis-

sion, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question'" (R. 82-83, J.A. 30-31).

The Respondent changed paragraph (2) of the findings in its Order No. 232. As changed, such paragraph as set forth in Order No. 232A read as follows:

"(2) Gas supply contracts containing provisions for rate changes dependent or based in whole or part on indefinite escalation clauses such as favored-nation, unlimited redetermination or renegotiation, spiral escalation, inflationary adjustment, price indices and revenue-sharing clauses have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies. As found by us in the proceeding of *The Pure Oil Company*, Docket No. G-17930, Opinion No. 341, these indefinite escalation provisions are in general contrary to the public interest. Such escalation provisions, therefore, are

generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies. However, limited price-redetermination provisions appear appropriate to meet the difficulty of pricing for long and unpredictable periods and to encourage the negotiation of long term contracts. Limited price-redetermination provisions, as hereinafter ordered, appear to be in the public interest and should be permitted in producer contracts for the sale or transportation of natural gas subject to our jurisdiction" (R. 81-82, J.A. 29-30).

On April 28, 1961, Petitioner filed an application for rehearing of the order issued March 3, 1961, Order No. 232, as amended by the order issued March 31, 1961, Order No. 232A (R. 84-91, J.A. 32-39). By a letter dated May 5, 1961, the Respondent rejected this application for rehearing for the stated reason that Order No. 232 issued March 3, 1961, as modified by Order No. 232A issued March 31, 1961, prescribed a general rule upon which an application for rehearing does not lie under section 19 of the Natural Gas Act (R. 94, J.A. 42).

On May 29, 1961, Petitioner filed, in the United States Court of Appeals for the Fifth Circuit, a petition to review and set aside Order No. 232, as modified and amended by Order No. 232A (R. 2-32). After the filing of briefs and hearing oral argument, the court, on April 25, 1962, issued its opinion and judgment dismissing the petition to review (Appendix A, pp. 1a-5a; R. 121-126). Oral argument in this proceeding was held in conjunction with a motion to dismiss in Case No. 19424, which Petitioner contended was a case involving a review of a specific application of Order No. 232, as amended by Order No. 232A. The Fifth Circuit

also sustained Respondent's motion to dismiss in that proceeding and Petitioner is concurrently filing a Petition For a Writ of Certiorari with respect to that action of the court below.

On May 16, 1962, Petitioner filed a petition for rehearing in this proceeding (R. 127-135). The court, by an order dated May 29, 1962, denied such petition (Appendix A, p. 5a; R. 136). Upon motion filed June 8, 1962 (R. 137-140), the court, by order entered June 14, 1962, stayed the issuance of the mandate for a period of thirty days, such stay to be continued in force until final disposition by the Supreme Court, provided that within thirty days from the date of the June 14, 1962 order there shall be filed with the Clerk of the Court of Appeals a certificate that a certiorari petition and the record have been filed with the United States Supreme Court (R. 141).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S COLUMBIA BROADCASTING SYSTEM AND STORER DECISIONS

The order issued March 3, 1961, as amended by the order issued March 31, 1961, adversely affects contractual and other rights in a manner similar to the orders reviewed in this Court's decisions in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942) and *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956). The rights which are adversely affected by such order are next discussed.

A. The Order Adversely Affects Contractual and Other Rights

The regulations promulgated by the order under review, Petitioner submits, alter and adversely affect the contract and rate-making powers of natural gas

companies, and their rate-changing and contract-changing powers. The rights so altered and adversely affected are those defined by this Court's *Mobile* decision[2] and reaffirmed in this Court's *Memphis* decision.[3] In its opinion in the *Memphis* case, this Court stated:

> "'* * * except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. No more is necessary to give full meaning to all the provisions of the Act: consistent with this, § 4(d) means simply that *no* change—neither a unilateral change to an ex parte rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission * * *' " [358 U.S. at pp. 110-111].

In addition, this Court in its *Memphis* decision stated:

> "* * * Mobile makes it plain that '§ 4(d) on its face indicates no more than that *otherwise valid* changes cannot be put into effect without giving the required notice to the Commission.' (350 U.S. at 339, 340). (Italics supplied.) The necessary corollary of this proposition is that changes which in fact are 'otherwise valid' in the light of the relationship between the parties can be put into effect under § 4(d) by a seller through giving the re-

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[2] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[3] *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

quired notice to the Commission. Mobile expressly notes that in the absence of any contractual relationship rates determined ex parte by the seller may be filed under § 4(d) * * *" [358 U.S. at 1121.

There can be no question that under this broad language Petitioner and all other natural gas companies have the right to enter into gas purchase contracts which include any pricing provisions that are valid between the parties. The above language obviously contemplates that a natural gas company will file these contracts as rate schedules and will file rate changes based on such contracts by giving the notice required by section 4(d) of the Act. The order of which Petitioner is seeking review would declare inoperative and of no effect at law all flexible pricing provisions except those specified in the order. This clearly has an adverse effect on Petitioner's right to enter into such contract arrangements and to file changes in rates based on such arrangements.

Respondent's power and authority to review rates and contract provisions under the rate review provisions found in sections 4 and 5 of the Natural Gas Act are not at issue in this proceeding. Those powers may only be exercised after observing the procedural safeguards of these sections. To eliminate or alter contractual rights with respect to rates, by declaring "otherwise valid" contract pricing provisions inoperative and of no effect at law, as Respondent has done by adopting the rules in question in this proceeding, would exceed the Respondent's rate review powers. Petitioner clearly has the right to have all valid contract provisions reviewed by Respondent under sections 4 and 5 of the Act. This right to review is eliminated with respect to most flexible pricing provisions when, as

here, the Respondent declares them to be inoperative and of no effect at law.

In its CATCO decision,[4] this Court made it clear that a natural gas company has the right to propose the terms under which it intends to commit its natural gas to the interstate market pursuant to the certificate requirements of section 7 of the Natural Gas Act, when the Court stated:

> "* * * * Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. Nor is there doubt that the producers were at liberty to refuse conditional certificates proposed by the Commission's second order * * * *" [360 U.S. at 387-388].

The rule adopted by the order which Petitioner contends is subject to review under section 19(b) of the Act in effect requires that any certificate proposal by an independent producer contain only the pricing provisions allowed in the order. All others are declared to be inoperative and of no effect at law.

The rule established by the Commission's order, if it is construed to deny the right to make *Memphis*-type rate change filings,[5] will thereby prohibit natural gas companies from contracting to change at will (subject

[4] *Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (1959).

[5] Such as those at issue in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). In that case, this Court stated: "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so" [358 U.S. at 113].

to the Commission's powers of review) the rates at which a natural gas company will sell its gas for resale in interstate commerce. This Court's decisions in the *Mobile* and *Memphis* cases, *supra*, hold that Petitioner has this right.

In the opinion of the Court of Appeals for the District of Columbia Circuit, an order or regulation which affects the initial rate-making or rate-changing powers which remain undefined and unaffected by the Natural Gas Act, "* * * amount to a legislative change which is beyond the authority of the Commission" *Willmut Gas and Oil Company v. Federal Power Commission*, 294 F. 2d 245 at 250 (1961), *cert. denied* U.S. (No. 506, Oct. Term 1961) 30 L.W. 3232, *rehearing denied* 30 L.W. 3273. The Commission's authority to issue rules and regulations is delineated by section 16 of the Natural Gas Act. The Respondent relies upon this section as authority for the issuance of the order of which Petitioner unsuccessfully sought review in the court below. But as the court stated in *Willmut*, *supra*, Respondent's authority under section 16 is expressly limited to those rules which "'* * * it may find necessary or appropriate to *carry out the provisions of this Act*,'" [294 F. 2d at 250] (Emphasis added) and not to enlarge its powers under the Act. In *Willmut*, *supra*, the court held, with respect to the language in this section of the Act, that the power

> "* * * granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, * * *" [294 F. 2d at 250].

In *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1936), this

Court dealt with the power of an administrative agency to prescribe rules and regulations in the following language:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * * And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable" [297 U.S. at 134, 135].

In holding that rules of general applicability issued by the Federal Communications Commission exceeded that Commission's authority in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954), this Court stated, "* * * the Commission's power in this respect is limited by the scope of the statute" [347 U.S. at 290].

Thus, it is clear that the Commission's rules, as promulgated in the order of which Petitioner seeks review, clearly deprive Petitioner of the fundamental contractual and other rights discussed herein, and are not in harmony with but contrary to sections 4, 5 and 7 of the Natural Gas Act. Moreover, these rules exceed the Commisson's rulemaking authority under section 16 of the Act. The rules clearly violate the fundamental constitutional safeguard set forth in the fifth amendment to the Constitution that a person shall not be deprived of his property without due process of law. Accordingly, for reasons set forth in the next subsection, Petitioner respectfully submits that its rights are

adversely affected by Respondent's order and under this Court's decisions in the *Columbia Broadcasting System* and *Storer* cases, *supra*, the order is reviewable.

B. The Order Is Reviewable Under This Court's Columbia Broadcasting System and Storer Decisions

The court below appears to have based its decision refusing to review Respondent's Order No. 232, as amended, primarily on the premise that the orders "* * * do not adjudge rights or obligations nor direct the taking or refraining from any particular action" (Appendix A, pp. 1a-5a; R. 123). However, this Court has in several cases, including its *Columbia Broadcasting System* and *Storer* decisions, *supra*, reviewed rules of general applicability.[6]

In the *Columbia Broadcasting System* decision, this Court set forth the criteria for review of orders of general applicability:

> "* * * It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked * * *" [316 U.S. at 422].

Although it appears that the contractual rights affected in the *Columbia Broadcasting System* case were those set forth in existing contracts, and the order here

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[6] *National Broadcasting Company, Inc.* v. *United States*, 319 U.S. 190 (1943); *Federal Communications Commission* v. *American Broadcasting Company, Inc.*, 347 U.S. 284 (1954); *American Telephone and Telegraph Co.* v. *United States*, 299 U.S. 232 (1936); *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953).

involved is not applicable to contracts executed prior to April 3, 1961, this Court considered, in the *Storer* case, *supra*, the effect of rules involved on future business affairs. In the *Storer* opinion, this Court said:

> "We think respondent had standing to sue at the time it exercised its privilege. The process of rulemaking was complete. It was final agency action, 5 USC § 1001(e) and (g), by which Storer claimed to be 'aggrieved.' When the authority to appeal was substantially the same, we held that an appellant who complained of the grant of a license to a competitor because it would reduce its own income had standing to appeal * * * " [351 U.S. at 198].
>
> * * * *
>
> "'The regulations here under consideration presently aggrieve the respondent. The Commission exercised a power of rulemaking which controls broadcasters. The Rules now operate to control the business affairs of Storer. Unless it obtains a modification of this declared administrative policy, Storer cannot enlarge the number of its standard or FM stations" [351 U.S. 199-200].

The analysis in subsection A, *supra*, shows that the rules adopted by Respondent will have an adverse effect on Petitioner's rights as delineated by this Court, including the very important right to make contractual provisions which recognize normal price variations for the sale of gas under long term contracts. Additionally, this analysis shows that the rules will adversely affect Petitioner's business affairs, by severely limiting its option to protect itself through the use of various flexible pricing provisions. Contrary to the findings of the Commission in *The Pure Oil Company* case, 25 F.P.C. 383 (R. 58, 81-83, J.A. 6, 29-31), that indefinite escalation provisions are contrary to the public interest,

the Court of Appeals for the Third Circuit in *Shell Oil Company* v. *Federal Power Commission*, 292 F. 2d 149 (1961),[7] *cert. denied* U.S. (No. 399, Oct. Term 1961) 30 L.W. 3154, stated:

> "Nor can we agree that the flexible pricing arrangement of the contract makes it severable to the degree that it does not come into effect with respect to the periods beyond the first until the actual price for each has been determined. *The motivation behind the periodic price adjustments is recognition of the probabilities of normal price variation in gas during the long duration of the contract. The principle makes sense against any contrary view that might be urged. Particularly, is it desirable as compared to an attempt to state rigid price figures for the whole future twenty five year operation* * * *" [292 F. 2d at 152] (Emphasis added).[8]

The quotation above from the *Storer* case also clearly indicates that the difference in the statutory route involved in the *Columbia Broadcasting System* case, *supra*,[9] and the *Storer* case, *supra*,[10] is immaterial.

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[7] The decision was on remand from this Court's decision in *Texas Gas Transmission Corp., et al.* v. *Shell Oil Company*, 363 U.S. 263 (1960).

[8] In this case the court had under consideration a periodic price redetermination provision, a form of flexible price provision apparently condemned by the Commission's rules, under which the price was to be determined at stated periods by the buyer and seller, but in the event they could not agree the price was to be determined by arbitration.

[9] The opinion recites review was sought pursuant to section 402(a) of the Communications Act and the Urgency Deficiencies Act [316 U.S. at 408].

[10] The opinion recites that review was sought under 5 U.S.C. § 1034 (section 4 of The Judicial Review Act), 47 U.S.C. § 402(a) (section 402(a) of the Communications Act of 1934, as amended) and 5 U.S.C. § 1009 (section 10 of the Administrative Procedure Act) [351 U.S. at 195].

Sections 2 and 4 of The Judicial Review Act, under which review was sought in the *Storer* case, appear similar in all material respects to section 19(b) of the Natural Gas Act, pursuant to which this review is sought. Hence, the *Columbia Broadcasting System* and *Storer* precedents should be considered as controlling with respect to the order issued March 3, 1961, as amended by the order issued March 31, 1961, and under these precedents, Petitioner believes it has shown itself to be aggrieved and entitled to judicial review.

II. THE APPEAL INVOLVES IMPORTANT LEGAL AND OTHER CONSIDERATIONS

Petitioner believes that a review of the order issued March 3, 1961, as amended by the order issued March 31, 1961, is important to the administration of the Natural Gas Act. This Court in its *Memphis* case, *supra*, not only reaffirmed that the initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Natural Gas Act, but stated that such rights were protected through preserving the integrity of private contractual arrangements which are needed in the light of business realities:

> "* * * Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress to take into account in framing its regulatory scheme

> for the natural gas industry, * * * and we think that it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S. at 344 (subject of course to any overriding authority of the Commission), but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review." [358 U.S. at 113-14].

This statement is equally applicable to independent producers, which it is believed provided the major portion of gas necessary to supply the some 30,554,000 natural gas utility customers in 1960, the sales to which customers produced some $5,306,556,000 in revenues in 1960. (See Forty-first Annual Report of the Federal Power Commission, 1961, p. 63.)

In its *Mobile* decision, *supra*, this Court also stated:

> "* * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry * * *" [350 U.S. at 344].

Petitioner respectfully submits that Respondent's order here under review seeks to limit the private contractual arrangements which Congress intended to preserve in order to accomplish, among others, the purposes mentioned in the above quotations. The extent to which Respondent's order seeks to limit private contractual arrangements is indicated by the terms of the proviso to section 154.93 of the Commission's Regulations under the Act. The proviso permits only one type of flexible pricing provision; namely, one price redetermination at a specific date in any one five-year contract period, provided there is no provision for a change in

price to a specific amount in such five-year period, and also provided that the price so redetermined shall not be higher than a producer's rate or producers' rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question (R. 82-83, J.A. 30-31). The limitations thus imposed are clearly contrary to the intent of Congress to preserve private contractual arrangements.

Moreover, if the order proscribing flexible pricing provisions is upheld, it will deprive the producers of natural gas of an equitable means of protecting themselves over the years against the problems of long-term contracts for the sale of natural gas. Cf. *Shell Oil Company* v. *Federal Power Commission, supra.* This Court, in its *Memphis* decision, *supra,* as Petitioner interprets it, declared that natural gas companies have a right to this long-term protection.

CONCLUSION

Respondent's Order No. 232 issued March 3, 1961, as amended by Order 232A issued March 31, 1961, adversely affects Petitioner's rights and is a reviewable order under section 19(b) of the Natural Gas Act. In Petitioner's view, the order, unless reviewed and set aside, will have a far-reaching and adverse effect on the use of private contractual arrangements by natural gas companies as intended by Congress and will be contrary to the regulatory scheme of the Natural Gas Act.

Accordingly, pursuant to section 19(b) of the Natural Gas Act and paragraph 1(b) of Rule 19 of the

Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 14th day of July, 1962:

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19001

SUN OIL COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

(April 25, 1962)

Before TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges.

JONES, Circuit Judge: This is a companion case, in a way, to *Sun Oil Company* v. *Federal Power Commission*, No. 19424, —— F. 2d ——, which this Court has decided today. In both cases we are asked to pass upon the validity of orders of the Commission which amend its Regulations. In the other case the petition for review was of an order in a proceeding to which the petitioner is a party and in which reference to the Regulation was made. In this case we are asked to review the amending order itself.

By its Order No. 232 and Order No. 232-A, issued March 3, 1961, and March 31, 1961, and made effective April 3,

1961, Section 154.93 was amended by adding the following proviso:

> "Provided, that in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
>
> (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
>
> (2) provisions that change a price to a specific amount at a definite date; and
>
> (3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

The petitioner, Sun Oil Company, filed with the Commission an application for rehearing. On May 4, 1961, the Commission advised Sun that the two orders prescribed a general rule upon which an application for rehearing does not lie, and that the application was being considered as a comment upon the orders. On the following day the application was rejected by the Commission and returned to Sun. A petition for review, filed by Sun, has brought the matter before us.

The Commission, although it filed no motion to dismiss, urges that there is a complete absence of any right of review and that this Court should, of its own motion, dismiss the petition for want of jurisdiction. The situation here is not wholly unlike that which was presented by *Magnolia Petroleum Co. v. Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 785, cert. den. 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. There the petitioners sought, by petitions for review, to have Order No. 174-A vacated, set aside and nullified upon the grounds, also here asserted, that the order was beyond the statutory powers of the Commission and deprived the petitioners of constitutional rights. So also, in *Magnolia* as in the case here considered, it was urged that although the order purported to be procedural in form it was actually adjudicatory by requiring and prohibiting action and depriving the petitioners of substantive rights. Order No. 232 and Order No. 232-A are not determinative of status, do not adjudge rights or obligations nor direct the taking or refraining from any particular action. With this being so, we hold as was held in *Magnolia* that the Orders and Regulation are not subject to review under the provisions of Section 19 (b) of the Natural Gas Act, 15 U.S.C.A. § 717 r (b). See also *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408; *California Oregon Power Company v. Federal Power Commission*, D. C. Cir. 1956, 239 F. 2d 426.

In the event that Sun seeks to put price increases into effect pursuant to a particular contract provision which the Regulation declares inoperative, and the Commission enters its order disallowing the increase and asserts Regulation 154.93 as the basis of its order, the validity of the order can be tested by a petition for review. Such order would be of a definitive character dealing with the merits of a proceeding before the Commission. *Federal Power Commission v. Metropolitan Edison Co., supra.* Until the Commission, in a proceeding before it, has entered an order or made a decision applying or enforcing the Regulation so

as to place in a position where it is required to do or refrain from taking some action, or is presently to be deprived of property or of a legal right, or some relationship or status is to be changed to its detriment, Sun will not be aggrieved within the meaning of the Act.

The argument is advanced by Sun that the orders constitute an unjustified and unauthorized interference with the right of contract. Cf. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373; *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, 79 S. Ct. 344, 3 L. Ed. 2d 350; *Sun Oil Company* v. *Federal Power Commission*, 5th Cir. 1959, 266 F. 2d 222, aff. 364 U. S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639. So too, Sun urges, it is for Congress, not the Commission, to correct the evils, if such they are, in the contractual rate change provisions which the Commission's orders would outlaw. It might be interesting to speculate as to whether or not it would be desirable that the Courts be given jurisdiction to pass upon the validity of administrative orders which are unrelated to a particular proceeding before the administrative body, or whether such jurisdiction, if granted, would be within the judicial power as conferred upon the Federal Courts. But since no effort has been made to confer such jurisdiction we need not indulge in seeking answers to hypothetical queries.

While this matter was pending before us the Commission, on February 8, 1962, issued its Order No. 242 which further amends its Regulation § 154.93 and other Regulations. We may take notice of its having been issued but are not called upon to comment with respect to its validity or effect.

Since we reach the conclusion that we have no jurisdiction, it follows that the petition for review must be

DISMISSED.

A true copy

Test: EDWARD W. WAIDSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

SEAL

New Orleans, Louisiana June 15, 1962

Judgment

Extract from the Minutes of April 25, 1962

No. 19001

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Sun Oil Company for review of orders of the Federal Power Commission issued March 3, 1961 and March 31, 1961 in Docket No. R-153, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review in this cause be, and the same is hereby, dismissed.

No. 19001

May 29, 1962

On Petition for Rehearing

Before TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

APPENDIX B

Excerpts from the Constitution of the United States Amendment V—Capital Crimes; Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

SEC. 4. • • •

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such

notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus

made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observe, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in ac-

cordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * * *

SEC. 7. * * *

(e)[2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judg-

---

[2] Subsection 7 (e) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

ment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)][3]

---

[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7-(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of

(d)[4] Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(d)]

(e)[5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

• • • • • • • • • • •

Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, which amended Section 7 (c), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F.P.C. 29.

[4, 5] See footnote 2, p. 7.

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

* * * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. * * *

(b)[9] Any party to a proceeding under this act aggrieved

[9] The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

Excerpts from the Communications Act of 1934, as Amended

PROCEEDINGS TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND ORDERS OF THE COMMISSION

SEC. 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

Excerpts from The Judicial Review Act

JURISDICTION

SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in

accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, * * *

* * * * * * * * * *

REVIEW OF ORDERS

SEC. 4. Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

Excerpts from the Administrative Procedure Act

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory re-

view proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all

relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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No. 249

In the Supreme Court of the United States

OCTOBER TERM, 1962

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 249

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

Orders Nos. 232 and 232A of the Federal Power Commission (R. 57–63, J.A.[1] 5–8; R. 80–83, J.A. 28–31) are reported at 25 F.P.C. 379, 26 F.R. 1983, and 25 F.P.C. 609, 26 F.R. 2850. The opinion of the Court of Appeals (Pet. App. A, pp. 1a–5a) is reported at 304 F. 2d 293.

[1] The printed joint appendix is found at pages 51 through 94 of the full record filed in this Court. References to materials in the joint appendix will be to the page as numbered for the record "(R. —)" as well as to the original joint appendix pagination "(J.A. —)".

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1962 (Pet. App. A., p. 5a). A timely petition for rehearing was denied on May 29, 1962 (Pet. App. A., p. 5a). The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a Court of Appeals has jurisdiction, under Section 19(b) of the Natural Gas Act, to review an order promulgating a rule of general applicability which declares certain types of indefinite rate change provisions in independent producer contracts inoperative and of no effect at law.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in Appendix B to the Petition at pages 6a–14a.

STATEMENT

Petitioner, an independent producer of natural gas, sought review (R. 2–32) in the Court of Appeals for the Fifth Circuit of the Commission's Order No. 232 (R. 57–63, J.A. 5–8), as amended by Order No. 232A (R. 80–83, J.A. 28–31). By that order, as modified, the Commission amended Section 154.93 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.93, which defines "rate schedules" for inde-

pendent producers of natural gas, by adding the following proviso (R. 82–83, J.A. 30–31):

> * * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are
> (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
> (2) provisions that change a price to a specific amount at a definite date; and
> (3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

The Court of Appeals dismissed the petition, holding that the Commission order was not reviewable under Section 19(b) of the Natural Gas Act.

The Commission issued the order sought to be reviewed in a rule-making proceeding initiated by a notice of proposed rule-making published in the Federal Register on April 12, 1956 (21 F.R. 2388), and by mailing notices to interested parties, including state and federal regulatory agencies (R. 57, J.A. 5).

In its notice (R. 54–56, J.A. 2–4), the Commission stated that it proposed to amend its regulations relating to independent producers, so as to describe certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules (R. 55, J.A. 3).[2]

The Commission, in its notice, invited comments on or before June 1, 1956, and stated that it would not act prior to receipt of such comments (R. 56, J.A. 4). Numerous responses were received by the Commission, both in support of and in opposition to the proposed rule (R. 40–46). No response was received from the petitioner. Thereafter, in *Pure Oil Co.*, 25 F.P.C. 383, affirmed, 299 F. 2d 370 (C.A. 7), an adjudicatory proceeding held in connection with an increased filing under Section 4 of the Natural Gas Act, the Commission received the benefit of extensive hearings, briefs and oral argument on the issue of whether or not "favored-nation" clauses are contrary to public policy.[3]

On March 3, 1961, simultaneously with its release of the decision in *Pure Oil, supra*, the Commission issued

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[2] Its specific proposal was that the Commission would not accept for filing contracts containing provisions calling for price adjustments involving "(a) escalator clauses based on price indices or changes in the price received by the purchaser upon resale, or (b) the payment or offer of payment of higher prices by the purchaser or other purchasers in the same or other producing areas to the same or other sellers" (R. 56, J.A. 4).

[3] While that case was decided on other grounds, the Commission, as stated in Order No. 232 (R. 58, J.A. 6), explained in detail why it regarded indefinite escalation clauses to be contrary to the public interest. *Pure Oil Co.*, 25 F.P.C. 383, 387–391.

Order No. 232, amending its regulations. It found that long-term gas supply contracts containing so-called "indefinite" escalation clauses—which it defined as all price escalation provisions other than those calling for increases of specific amounts at definite dates or those intended to reimburse the seller for all or any part of changes in production, severance or gathering taxes levied on the seller—" * * * have contributed instability and uncertainty concerning prices of gas and service expansion by natural gas companies," and, as found in *Pure Oil Co.*, 25 F.P.C. 383, are contrary to the public interest. For these reasons, the Commission amended its regulations to prohibit use of indefinite escalation provisions in new producer contracts. It originally did so by adding definitions of "definite" and "indefinite" escalation clauses to Section 154.91 of its regulations, and by adding a proviso to Section 154.93 of its regulations declaring that any provision for a change of price based on an indefinite escalation clause in a contract filed on or after April 3, 1961, would be "inoperative and of no effect at law" (R. 59–60, 63, J.A. 7–8, 11). The order provided that the amendments to the regulations would become effective April 3, 1961, but, in view of the period of time which had elapsed since the original notice of rule-making, that any interested person could submit written views or comments to the Commission by March 20, 1961 (R. 60, J.A. 8). On March 31, 1961, the Commission, upon consideration of comments filed by interested persons, issued Order No. 232A, modifying the amendments to

the regulations promulgated by Order No. 232, which were to become effective April 3, 1961 (R. 80–83, J.A. 28–31).

In this new order, the Commission found that the "elimination of all indefinite escalation provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-term contracts, we should permit future contracts to contain limited price redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and, therefore, controlled)" (R. 80–81, J.A. 28–29). It also decided that the amendment to the regulation would apply only to contracts "executed" on or after April 3, 1961. (Under Order No. 232 the amendment would have applied to contracts "filed" on or after that date, whenever executed.) The amendment to the regulation was also modified to conform with these conclusions. As modified, the regulations were amended, effective April 3, 1961, by the addition of a proviso to the definition of rate schedule for independent producers, set out in Section 154.93 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.93. This provision states that only three types of rate change provisions will be given any effect, *supra*, p. 3. An application for rehearing from Order No. 232A tendered by petitioner (R. 84–91, J.A. 32–39) was rejected on the ground that Order No.

232A prescribes a general rule from which an application for rehearing does not lie (R. 94, J.A. 42).

On review, the Court of Appeals for the Fifth Circuit, after briefs and oral argument, dismissed Sun's petition on the ground that the order promulgating the Commission's regulations was not subject to review under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) (Pet. App. pp. 3a, 12a-14a).[4]

ARGUMENT

The court below was, we believe, clearly correct in holding that Section 19(b) of the Natural Gas Act vests no jurisdiction in it to review orders of the Commission amending its general rules and regulations. Since the courts of appeals have consistently reached this result and there is no conflict of decision, there is no occasion for review here.

1. Each of the four Courts of Appeals in which review of Commission orders of general applicability has been sought under Section 19(b) of the Natural Gas Act has found that there is no jurisdiction to grant such review. See *United Gas Pipe Line Co.* v. *Federal*

[4] The section of the regulations here involved was further modified by Order No. 242 of the Commission, 27 F.R. 1356 (issued February 8, 1962), to provide that any contract executed on April 2, 1962, or thereafter, containing any proscribed price-changing provision would be rejected if filed as a rate schedule. Order No. 242 also provides (1) that, an independent producer's application for a certificate of public convenience will be rejected if it relies on any contract executed on or after April 2, 1962, containing a proscribed price-changing provision, and (2) that in a pipeline's certificate proceeding such contracts would not be considered in support of a pipeline's certificate application.

Power Commission, 181 F. 2d 796 (C.A.D.C.), certiorari denied, 340 U.S. 827 (order issuing rules requiring pipeline companies to file rates in tariff form); *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C.A. 10) (order issuing rules after decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, to provide procedures applicable to independent producers); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 (C.A. 5), certiorari denied, 352 U.S 968 (generally same as *Amerada*); *Shell Oil Co.* v. *Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962 (Order No. 242, *supra*, p. 4, providing for rejection of rate schedules and certificate applications containing indefinite price-changing provisions made invalid by Order Nos. 232 and 232A); *Hunt Oil Co.* v. *Federal Power Commission*, C.A. 5, Nos. 19711, *et al.*, decided August 14, 1962 (same as *Shell*); cf. *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (C.A.D.C.) (policy statement prescribing area price levels to be followed by the Commission in determining acceptability of initial price proposals and increased rate filings of independent producers).

As these courts recognized, Congress, in enacting Section 19(b), did not make every Commission action reviewable in the courts of appeals but rather prescribed, as it may (*e.g.*, *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U.S. 385, 389–390, *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 404; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U.S. 156, 159), certain conditions which must be

met before a court of appeals may review Commission action. As this Court's opinion in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384, points out, Section 313(b) of the Federal Power Act (which contains provisions identical to those contained in Section 19(b) of the Natural Gas Act), indicates

> "* * * the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

The review provisions of Section 19(b) "evidence Congressional recognition that an appellate court has no intelligible basis for decision unless a subordinat tribunal has made a record fully encompassing the issues." *United Gas Pipe Line Co. v. Federal Power Commission,* 181 F. 2d 796, 799, certiorari denied, 340 U.S. 827. Indeed, Section 19(b) permits review only at the instance of a "party to a proceeding" who is "aggrieved" by the Commission's "order". Mere aggrievement is not sufficient to support review (*Mag-*

nolia Petroleum Co. v. *Federal Power Commission*, 236 F. 2d 785, 792, certiorari denied, 352 U.S. 968), and, of course, it is settled that not every Commission action or order is a reviewable "order." *E.g.*, *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375 (refusal to limit evidence in rehearing to issues raised by application for rehearing); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (findings as to lawfulness of past rates); *Northern Natural Gas Co.* v. *Federal Power Commission*, 288 F. 2d 441 (C.A. 3) (order allowing intervention); *Amerada Petroleum Corp.* v. *Federal Power Commission*, 285 F. 2d 737 (C.A. 10) (order denying offer of compromise); *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819 (C.A. 5) certiorari denied, 352 U.S. 967 (order suspending changed rates); *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445 (C.A.D.C.) (order denying request for trial examiner's report); *East Ohio Gas Co.* v. *Federal Power Commission*, 115 F. 2d 385 (C.A. 6) (order instituting investigation).

Finally no objection to an "order" may be considered on review unless it shall have been urged before the Commission in an "application for rehearing." It is clear, therefore, that Section 19(b) contemplates review only of orders issued in proceedings of an adjudicatory nature, *i.e.*, those in which the final Commission action is entered after a hearing or opportunity therefor, and based on a record.

2. Order No. 232, 26 F.R. 1983, as amended by Order No. 232A, 26 F.R. 2850, does not meet Section 19(b)'s "distinctive formulation of the conditions under which resort to the courts may be made." Cf. *Federal*

Power Commission v. *Pacific Power & Light Co.*, 307 U.S. 156, 159. In amending its regulations by issuance of these orders, the Commission proceeded in announced reliance on Sections 4, 7, and 16 of the Natural Gas Act and promulgated regulations purporting to be of general applicability as authorized by these sections. These provisions do not require the holding of a hearing or any other kind of "proceeding" prior to the promulgation of regulations, and none was in fact held. Nor did the Administrative Procedure Act require a "proceeding" of the kind plainly envisaged by Section 19(b). That statute requires only that the Commission give appropriate notice to the persons subject to the proposed rule (Section 4(a), 60 Stat. 238, 5 U.S.C. 1003(a)), and afford interested persons an opportunity to submit "written data, views, or arguments with or without opportunity to present the same orally in any manner (Section 4(b), 60 Stat. 238, 5 U.S.C. 1003(b)).[5] Thus, while the procedural requirements for issuing a rule were met here, there was no evidence or record of the sort contemplated as prerequisites for review under Section 19(b) of the Natural Gas Act.

Moreover, consistently with the Commission's compliance with the rule-making procedure, the orders sought to be reviewed show on their face that they are of general applicability. They are intended to apply generally to all independent producers of natural gas. And, while the regulations limited the

[5] In promulgating general rules, as in legislation, there is no constitutional right to a hearing, *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado*, 239 U.S. 441; *Bowles* v. *Willingham*, 321 U.S. 503, 519–520.

types of permissible escalation provisions in contracts executed after the effective date of the amendment to the regulation, this amendment did not affect any existing contracts. For by its terms, the promulgating order made the amendment apply only to contracts executed on or after April 3, 1961, which postdates both Orders No. 232 and 232A.

In these circumstances, it seems plain that the amendment to the regulations involved rule making, not adjudication, that hence no hearing was required prior to its issuance, and that it is not reviewable at this time under Section 19(b) of the Act.

3. Petitioner's reliance (Pet. 7, 13–16) on such cases as *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, in which rules of general applicability were held to be reviewable under other statutes, is misplaced. Such cases arise under statutes which, unlike Section 19(b) of the Natural Gas Act, do not limit review to parties to proceedings of an adjudicatory nature.[6] In each in-

[6] In *Columbia Broadcasting*, *supra*, review was pursuant to Section 402(a) of the Communications Act, 48 Stat. 1093, which permitted suits to "enjoin, set aside, annul or suspend any order of the Commission", except those involving certain license matters, pursuant to the provisions of the Urgent Deficiencies Act, 38 Stat. 219, 28 U.S.C. 1253, 2101, 2284, 2325. The licensing orders excluded from Section 402(a) suits were to be reviewed directly by the Court of Appeals for the District of Columbia, pursuant to 47 U.S.C. 402(b), which, like Section 19(b) of the Gas Act, contemplates review only of orders issued in adjudicatory type proceedings.

In *Storer Broadcasting*, *supra*, review was also pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), though review jurisdiction had by then been transferred from

stance, moreover, the rule in question was deemed by the Court to have an immediate impact not only upon petitioner's planning for the future, but upon its existing operations as well.[7] At least three courts of appeals have recognized that cases construing other statutory provisions governing reviewability do not control in dealing with the more restricted provisions of Section 19(b). See, *e.g.*, *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 733, 755 (C.A.D.C.); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785, 792 (C.A. 5), certiorari denied, 352 U.S. 968; *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461, 464 (C.A. 10). Moreover, as indicated, *supra*, the rule involved here, unlike the rules in the cases cited by petitioners, was expressly made applicable only to contracts entered

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three-judge district courts to the various courts of appeals. See Act of December 29, 1950, 64 Stat. 1129, as amended, 5 U.S.C. 1032–1042. The change in review court was not intended to affect the prior law on the nature of orders reviewable under Section 402(a). See H. Rep. No. 2122, 81st Cong., 2d Sess.

[7] In *Columbia Broadcasting*, *supra*, this Court found that the network's affiliates were then cancelling or threatening to cancel existing contracts to conform to the regulations there involved (316 U.S. at 423). In *Storer Broadcasting*, *supra*, aggrievement was found to exist not just because of its effect on business planning but also because acquisitions of Storer's stock by certain members of the public not subject to Storer control could result in a forfeiture of existing Storer licenses. See 351 U.S. at 197, 199–200. Similarly, in *Frozen Food Express* v. *United States*, 351 U.S. 40, an order was found reviewable where disregard of it could subject a carrier to criminal penalties.

into after its adoption. It can in no way affect Sun's rights under contracts consummated prior to that date, to say nothing of its rights under certificates previously issued on the basis of such contracts.

We do not suggest, of course, that the amendment to the regulation here involved is completely beyond judicial review, but only that the promulgating order is not itself directly reviewable under Section 19(b). Petitioner or others, if aggrieved, will, of course, be able to test the validity of the amendment if the Commission rejects an increased rate filing based on an invalid price escalation provision, or (in accordance with the further amendment to the regulation made by Order No. 242, *supra*, p. 7, n. 4) rejects a rate schedule or certificate application containing an invalid pricing clause. See, *e.g.*, *Sun Oil Co.* v. *Federal Power Commission*, 266 F. 2d 222 (C.A. 5), affirmed 364 U.S. 170.[8]

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[8] Unlike the situation in *Columbia Broadcasting*, *supra*, it has not been shown that, as a result of Order No. 232, as amended by Order No. 232A, contracts containing non-permissible pricing clauses cannot be negotiated by either petitioners or other producers. That such clauses can be negotiated is clear from the fact that the Commission recently had occasion to reject producer applications for certificates of public convenience and necessity because they were based on contracts executed after April 2, 1962 (the effective date of Order No. 242) which contained non-permissible price changing provisions. *E.g.*, *Cities Service Petroleum Co.*, F.P.C. Docket No. CI63-131, letter order issued August 16, 1962 (unreported); *Gulf Oil Corp.*, F.P.C. Docket No. G-16524, letters orders issued July 27, 1962 and August 17, 1962 (unreported).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 249

SUN OIL COMPANY, *Petitioner*,

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FEDERAL POWER COMMISSION, *Respondent*.

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REPLY BRIEF OF PETITIONER SUN OIL COMPANY

Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Sun Oil Company, submits its reply brief to the brief for the Federal Power Commission (Respondent) in opposition.

PRELIMINARY STATEMENT

As set forth in more detail in the petition for a writ of certiorari, the orders of which review are sought in this proceeding declare inoperative and of no effect at law all flexible pricing provisions, except those specifically exempted therein, in contracts executed by independent producers on or after April 3, 1961, for the sale or transportation of natural gas in interstate commerce, subject to the jurisdiction of the Respondent. In such petition it was further pointed out that the orders thus deprive Petitioner of the rights to negotiate contracts containing most types of flexible pricing provisions heretofore found valid and enforced by

the Courts, which this Court's *Mobile*[1] and *Memphis*[2] decisions clearly hold Petitioner and all independent producers have a right to negotiate.

The petition also pointed out that the orders deprive Petitioner of the right to make rate filings based on such proscribed flexible pricing provisions and to have them reviewed pursuant to the Commission's authority to review rates under Sections 4 and 5 of the Natural Gas Act. Additionally, the orders effectively deprive Petitioner of the right to propose in a certificate proceeding under Section 7 of the Natural Gas Act the conditions under which its natural gas will be committed to the interstate market as Petitioner believes this Court's *CATCO* case[3] held it had a right to do. Moreover, Petitioner also pointed out in its petition that the orders exceed the Commission's rule-making powers under Section 16 of the Natural Gas Act.

In the brief for Respondent in opposition it is asserted that the petition should be denied because the orders of which review is sought promulgated rules of general applicability, the orders were not issued in a proceeding of an adjudicatory nature and thus are not reviewable under Section 19(b) of the Act, and it is argued that this Court's *Columbia Broadcasting System*[4] and *Storer*[5] decisions particularly relied on in the petition for a writ of certiorari are not applicable.

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[1] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[2] *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958).

[3] *Atlantic Refining Co. v. Public Service Commission of the State of New York*, 360 U.S. 378 (1959).

[4] *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942).

[5] *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956).

ARGUMENT

1. In the petition for a writ of certiorari several decisions of this Court, including the *Columbia Broadcasting System* and *Storer* decisions, *supra*, reviewing orders of general applicability were cited (Pet. p. 13). The Court of Appeals for the District of Columbia Circuit in *Philadelphia Co. v. Securities & Exchange Commission*, 164 F. 2d 889 (1947), *certiorari denied*, 333 U.S. 828,[6] specifically pointed out that rules or regulations of general applicability were reviewable when their impact applies specifically and affects or determines the right of a particular person. In that case, the Court stated:

> "* * * But not even the fact that the action of an administrative agency is phrased to apply generally, or may indeed have general application, is necessarily conclusive that its action is not subject to review as an 'order' under the Urgent Deficiencies Act as extended by the Communications Act, or under Section 24(a) of the Holding Company Act. If in its impact a 'rule or regulation' applies specifically and affects or determines the rights of a particular person or corporation, then the action of the agency in promulgating it is reviewable even though the 'rule or regulation' is not directed in terms to any particular person or corporation. This is evidenced by the ruling of the Supreme Court in the Columbia System case just cited * * *" [82 App. D.C. at 346, 164 F. 2d at 900].

As to the impact of the orders on Petitioner and others, the petition for a writ of certiorari pointed out that in this Court's *Columbia Broadcasting System* case, *supra*, regulations were reviewed which purport

[6] For the subsequent history of this case see 175 F. 2d 809 (1948); *vacated* (on joint motion) per curiam 337 U.S. 901 (1949).

to operate to alter and affect adversely present contractual rights and business relations as do the rules promulgated by the orders under review. It was also pointed out that in this Court's *Storer* decision, *supra*, this Court considered the effect of the rules of general applicability reviewed in that case on future business affairs[7] (Pet. pp. 13-14). Additionally, it seems appropriate to point out that the United States Court of Appeals for the Tenth Circuit in *Keeler* v. *Commissioner of Internal Revenue*, 180 F. 2d 707 (1950) stated that actions which adversely affect legal rights or operate adversely on property rights constitute aggrievement as do the orders under review, when the Court stated:

> "* * * The rule that only a party aggrieved by a decision may appeal is recognized, but to be aggrieved it is not necessary that there be an actual pecuniary loss. The proper test is whether the decision invades the legal rights of a person or operates adversely on his property rights and interests" [180 F. 2d at 709].

The Tenth Circuit in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (1955), *certiorari denied, sub nom. Michigan Wisconsin Pipe Line Company* v. *Phillips Petroleum Company*, 350 U.S. 1005 (1956), citing decision of the Fourth Cir-

[7] As the brief for Respondent points out, the Court also considered the dangers to Storer's existing licenses that could result by reason of persons not subject to Storer's control acquiring stock (Br. in Opp. p. 13, fn. 7). However, this Court also found that: "These [the effects of the regulations on (1) future business affairs prohibiting enlargement of the number of stations and (2) danger to Storer's existing licenses] are grievances presently restricting Storer's operations" (351 U.S. at 200). Thus, it definitely appears this Court considered either effect to constitute aggrievement, and reviewability in that case did not, it is submitted, depend on the danger that could result to Storer's existing licenses.

cuit and the First Circuit[9] held that "* * * reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review" [227 F. 2d at 474].[10] There can be no question that the orders here under review purport to determine with finality the legal rights of Petitioner to enter into contracts containing flexible pricing provisions and adversely to affect other rights as described in the preliminary statement above.

Prior to the date the orders under review were promulgated, the flexible pricing provisions proscribed by these orders were valid and legal for all purposes in connection with the transportation and sale of natural gas subject to the Commission's jurisdiction.[11] The rejection of two contracts containing proscribed provisions as set forth in the brief for Respondent (Fn. 8, p. 14) clearly signifies that under the Respondent's orders a contract containing a proscribed pricing provision is at most a condition precedent to test the validity of Respondent's orders. As most sales are from multi-ownership fields, the advent of drainage unless sales are promptly authorized, and the attendant loss

[9] *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (4th Cir. 1953).

[9] *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334 (1st Cir. 1953).

[10] See also, *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. denied, sub nom. Magnolia Petroleum Company* v. *Cities Service Gas Company*, 358 U.S. 837 (1958); and *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222 (5th Cir. 1959), *affirmed* 364 U.S. 170 (1960).

[11] Cf. *Texas Gas Transmission Corporation* v. *Shell Oil Company*, 363 U.S. 263 (1960).

of leases, would even prevent Court review of the validity of the regulations in substantially all cases. Except in rare instances, in Petitioner's view, no pipeline company would be willing to negotiate a contract which could not in any event become valid under the orders involved until the authority of the Commission to promulgate the rules involved had been determined by the Courts. Thus, even to suggest that the orders have no immediate adverse impact on Petitioner and others completely ignores realities.

2. The contentions in the brief on behalf of Respondent (Br. in Opp. pp. 9-10) that Section 19(b) of the Act only authorizes review of orders issued in proceedings of an adjudicatory nature appear to be predicated on the language of this Court's decision in *Metropolitan Edison*[12] that Section 19(b) only contemplates review of orders issued in a proceeding in which the Commission has taken evidence and made findings. However, since that case was decided, there have been numerous cases[13] in which orders of Respondent, entered without hearing and findings based thereon have been reviewed

[12] *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U.S. 375 (1938).

[13] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958); *Cities Service Gas Company* v. *Federal Power Commissoin*, 255 F. 2d 860 (10th Cir. 1958); *cert. denied* 358 U.S. 837 (1958); *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir. 1955); *cert. denied* 350 U.S. 1005 (1956); *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334 (1st Cir. 1953); *Sunray Mid-Continent Oil Company* v. *Federal Powe. Commission*, 270 F. 2d 404 (10th Cir. 1959); *The Pure Oil Company* v. *Federal Power Commission*, 292 F. 2d 350 (7th Cir. 1961); *J. M. Huber Corporation* v. *Federal Power Commission*, 294 F. 2d 568 (3rd Cir. 1961).

by the Courts, including review by this Court of the letter orders involved in *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170 (1960). In that case, as here, Respondent in the Court below contended that the orders entered without a hearing were not reviewable, *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222, 226 (5th Cir. 1959). There can be no question that the orders here involved were final agency action in a completed rule-making proceeding as were the orders reviewed in the *Storer* case, *supra*, (351 U.S. at 198). Moreover, Petitioner was a party to the proceedings (R. 93; J.A. 41)[14] and filed timely applications for rehearing (R. 65-78; J.A. 13-26; R. 84-91; J.A. 32-39). Clearly, under the foregoing precedents and circumstances, the issuance of the orders without notice and opportunity for hearing, as it is asserted in the brief for Respondent that Respondent was authorized to do, did not render the orders which promulgated the rules immune from review under Section 19(b) of the Act.

3. The brief for Respondent also argues that Petitioner's reliance on this Court's *Columbia Broadcasting System* and *Storer* decisions is misplaced, because in those cases rules of general applicability were reviewed under statutes unlike Section 19(b) which is limited to review of proceedings of an adjudicatory nature. It is shown in the preceding section that review under Section 19(b) is not so limited. In the petition for a writ of certiorari it was pointed out that the provisions of The Judicial Review Act under which

[14] Record references are to the transcript of record prepared by the Clerk of the United States Court of Appeals for the Fifth Circuit. Pages 51 through 94 of such record consist of the joint appendix filed with the Court of Appeals and references thereto are also included when applicable.

the *Storer* case was reviewed appears similar in all material respects to Section 19(b). The assertion in the brief in opposition (p. 13, fn. 6) that the "* * * change in review court was not intended to affect the prior law on the nature of orders reviewable under Section 402(a) [of the Communications Act]" would also indicate that after the change in the statute orders of general applicability formerly reviewable under the Urgent Deficiencies Act are now reviewable under a statute similar to Section 19(b) of the Natural Gas Act [i.e., Sections 2 and 4 of The Judicial Review Act] and, thus, orders of general applicability are reviewable under Section 19(b). In the *Philadelphia* case, *supra*, the Court of Appeals for the District of Columbia Circuit stated that no distinction could be drawn with respect to the nature of the statutory route for review of the order of general applicability in that case, i.e., Section 24(a) of the Holding Company Act which appears similar in all material respects to Section 19(b) of the Natural Gas Act,[15] and the Urgent Deficiencies Act, as extended by Section 402(a) of the Communications Act:

> "We think no proper distinction can be drawn between the Rochester Telephone case and the instant case because in the former the review sought was before a three-judge court under the Urgent Deficiencies Act, as extended by Section 402(a) of the Communications Act of 1934, and in the instant case under Section 24(a) of the Holding Company Act. It is not the nature of the judicial tribunal nor of the statutory route thereto which determines the reviewability of an order of an administrative agency. The test lies in the two

[15] The differences between Section 24(a) and Section 19(b), e.g., such as persons or party aggrieved may seek review and an application for rehearing is not a prerequisite for review, are not material as far as this proceeding is concerned.

requisites of primary jurisdiction and administrative finality laid down and explained in the Rochester Telephone case" [82 App. D.C. at 345, 164 F. 2d at 899].

It is submitted that Courts of Appeals have jurisdiction to review orders of general applicability issued by Respondent; that the orders under review have administrative finality with respect to Petitioner's contractual and other rights as discussed above; and that Petitioner is aggrieved by the orders.

For all the foregoing reasons and the reasons set forth in its petition for a writ of certiorari, Petitioner respectfully prays that its petition be granted.

Respectfully submitted,

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